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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CONSTANCIO GONZALEZ,

Defendant and Appellant.

B212905

(Los Angeles County
Super. Ct. No. KA084185)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia G. Fisher, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

As the result of a physical altercation between defendant Constancio Gonzalez and his former girlfriend, a jury convicted him of misdemeanor battery and disobeying a domestic relations court order. On appeal, defendant contends the trial court committed reversible error when it denied his request to represent himself on the day of trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Charges

Defendant was charged by information on September 23, 2008, with one count each of residential burglary (Pen. Code,¹ § 459), misdemeanor vandalism (§ 594), misdemeanor battery (§ 243, subd. (e)(1)) and disobeying a domestic relations court order (§ 273.6, subd. (a)). Defendant, represented by the public defender's office, pleaded not guilty.

B. The Denial of Defendant's Request for Self-Representation

On November 4, 2008, the prosecutor and defense counsel announced they were ready for trial. The trial, then set for November 6, 2008, was trailed to November 10, 2008. On that morning, defendant, through his counsel, made a motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to discharge his appointed counsel. After a closed hearing before Judge Daniel J. Buckley, the motion was denied. Defendant then requested to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*). Before considering the request, Judge Buckley had

¹ All further statutory references are to the Penal Code.

defendant complete an advisement and waiver of right to counsel form (commonly referred to as a *Faretta* waiver) and scheduled a hearing for that afternoon.

When proceedings resumed in the afternoon, the judge asked defendant if he still wished to represent himself after completing the *Faretta* waiver. Defendant answered his “first desire would be to get a different counsel, but that was denied.” Defendant continued, “Yes, as far as representing myself, I would need time to learn court’s protocol, legal procedures, motions and all that other good stuff that I’m not familiarized [sic] with.” The judge replied, “That’s part of the reason why I’m going to strongly recommend you not do this. It’s a big mistake. You’re at distinct disadvantage. [¶] The first thing we need to discuss is the fact that you have a trial scheduled for today, and it’s what we call 48 of 60, meaning that your trial has to be started within the next 12 days.”

When the prosecutor objected to a continuance, the judge asked defendant if he would be prepared to represent himself at trial. Defendant answered, “Not within 12 days.” The judge then denied defendant’s *Faretta* request, stating, “I understand it to be a reasonable representation that you’re not ready to start trial within the next 12 days.” Defendant confirmed, “I have to be honest that I would not be able to represent myself.”

Defendant sought to address the court again, and was instructed to confer first with defense counsel. When the court subsequently asked if he was ready to proceed, defendant answered, “I have no choice, sir. I feel [defense counsel] is not ready. I feel I won’t be able to be ready in 12 days. I feel I’m not being properly represented.” The trial court replied, “We’ve discussed that, sir, as far as you being properly represented. I’ve made that decision. Given your representation, which I find to be extremely reasonable, that you’re not ready, what we’ll do is trail this to Wednesday, November 12. It will be then day 50 of 60.”

On November 13, 2008, the case was transferred to a new department for trial. Before trial began, the trial court and counsel discussed the state of plea negotiations. The prosecutor renewed her plea offer, which defendant rejected. Jury selection commenced the next day.

C. Summary of Trial Evidence

According to the prosecution evidence, prior to August 2008, Bertha Castellanos (Castellanos) and defendant had dated and lived together in Castellanos's home for several years, until Castellanos learned that defendant was married.

On August 14, 2008, at approximately 7:30 a.m., Castellanos discovered her bed was soaking wet. The bedroom window was closed, but not locked, and a garden hose was on the ground outside her bedroom. Castellanos decided to sleep on the floor. She heard a loud noise and saw defendant standing outside the bedroom window. He asked Castellanos if she had a good time the night before. When Castellanos attempted to run from the bedroom, defendant came through the window, grabbed her wrist and threw her down. As she fell to the floor, Castellanos struck her head and neck on a nightstand. Defendant retrieved a can of beer from the dresser and poured it over Castellanos's head and slapped her face. Castellanos left the bedroom to call police; defendant said he was leaving. Fearing defendant would hit her again, Castellanos put the telephone down after dialing 911. However, she did not hang up, knowing that would prompt police to respond. Officers arrived, spoke to Castellanos, and arrested defendant at his home.

On two occasions, defendant had previously attacked Castellanos in her home. On June 1, 2008, defendant hailed Castellanos outside her bedroom window. When she opened the window, he grabbed her hair and partially dragged her out of the window. As a result of this incident, a restraining order was issued against defendant. On April 27, 2008, defendant kicked and slapped Castellanos during an argument in her home.

Defendant testified in his defense and admitted pleading no contest to a charge of battery against Castellanos as a result of the June 1, 2008 incident. He knew Castellanos had a restraining order against him, but testified he had violated it because he was "stupid." According to defendant, Castellanos was jealous of his relationship with his son and his wife. He had allowed Castellanos to persuade him to resume contact with her.

On the morning of August 14, 2008, defendant went to Castellanos's home at around 5:30 a.m., entering through the backdoor and leaving within minutes of his

arrival. Castellanos was on the bedroom floor. Defendant knew she had been drinking so he went inside to get her car keys so she would not drive anywhere. Defendant denied attacking Castellanos. Instead, she was the aggressor. When defendant realized he was not going to get the car keys from Castellanos, he started to leave her bedroom. She grabbed his arm. Defendant jerked his arm back, accidentally causing Castellanos to fall backwards onto the floor.

D. Verdict and Sentencing

The jury acquitted defendant of residential burglary and vandalism, but convicted him of battery and disobeying a domestic relations court order. The trial court placed defendant on three years formal probation, on condition he serve 270 days in county jail, with credit for presentence custody.

DISCUSSION

Defendant contends the court violated his Sixth Amendment right to self-representation by summarily denying his *Faretta* motion as untimely, without evaluating the factors required under *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*).

A. Absolute Right to Self-Representation for Timely Request

A right to self-representation is implied in the Sixth Amendment to the United States Constitution. (*Faretta, supra*, 422 U.S. at p. 819.) The right to counsel guarantees a defendant the *assistance* of counsel if the defendant wants it. It does not require a defendant to use an attorney. “[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial.” (*Windham, supra*, 19 Cal.3d at pp. 127-128, fn. omitted.) This right is absolute and unconditional if the motion is timely made and if the defendant is competent to waive counsel. (*People v. Valdez* (2004) 32 Cal.4th 73, 97-98.)

B. Discretion to Grant Self-Representation for Untimely Request

A defendant's right to self-representation, however, is absolute only if he or she invokes that constitutional right a reasonable time prior to the start of trial. (*Windham, supra*, 19 Cal.3d at pp. 127-128 ["in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial"]; accord, *People v. Butler* (2009) ___ Cal.4th ___, ___ [2009 DJDAR 17237, 17240].) If a defendant asserts the right to self-representation on the eve of trial or after trial has commenced, the trial court has discretion to deny the request. (*Windham, supra*, at p. 128 ["once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court"]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [motion for self-representation made on the eve of trial is untimely and is thus addressed to sound discretion of the trial court]; *People v. Clark* (1992) 3 Cal.4th 41, 99-100 [trial court had discretion to deny motion for self-representation because it was made when the trial date was being continued on a day-to-day basis, in effect on the eve of trial]; see *People v. Wilkins* (1990) 225 Cal.App.3d 299, 303 [request to proceed in propria person made on the eve of trial is untimely]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 625-626 [motion made on the Friday before a trial scheduled to begin the following Monday was untimely].)

C. Defendant's Faretta Request was Untimely

Defendant's *Faretta* request was untimely as it was made on the day trial was to begin. As a result, trial court had discretion in deciding whether or not to grant the motion. However, given the importance of the right to self-representation, the trial court may not simply deny an untimely motion for self-representation. Rather, "trial courts confronted with nonconstitutionally based motions for self-representation [must] inquire *sua sponte* into the reasons behind the request" (*Windham, supra*, 19 Cal.3d at p. 129,

fn. 6) and exercise their sound discretion after considering several factors, including “the quality of counsel’s representation of the defendant, the defendant’s prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.” (*Id.* at p. 128; see *People v. Wilkins*, *supra*, 225 Cal.App.3d at p. 303 [grant or denial of request made on the eve of trial “is within the sound discretion of the trial court after it has inquired sua sponte into the specific factors underlying the request”]; see generally *People v. Burton* (1989) 48 Cal.3d 843, 852 [trial court’s discretion to deny an untimely motion exists “to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice”].)

D. Trial Court’s Failure to Make *Windham* Inquiry

The Supreme Court in *Windham*, however, “decline[d] to mandate a rule that a trial court must, in all cases, state the reasons underlying a decision to deny a motion for self-representation which is based on nonconstitutional grounds.” (*Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6.) The court’s exercise of discretion in denying the untimely motion is properly affirmed if substantial evidence in the record otherwise supports the inference the court had those factors in mind when it ruled. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) This is true even if the trial court failed not only to state the reasons for its decision to deny the motion but also to make the sua sponte inquiry generally required. Thus, in *People v. Dent* (2003) 30 Cal.4th 213, a request for self-representation was denied without a *Windham* inquiry solely because it was a death penalty case, an improper reason. The Supreme Court stated, “Even though the trial court denied the request for an improper reason, if the record as a whole establishes defendant’s request was nonetheless properly denied on other grounds, we would uphold the trial court’s ruling.” (*Dent*, at p. 218.) Ultimately the Supreme Court concluded the record in *Dent* did not otherwise support denial of the motion. Nevertheless, *Dent* sanctions appellate review of the entire record to determine whether the trial court abused

its discretion in denying a motion for self-representation, even when the trial court based its denial of self-representation on an improper ground and without a *Windham* inquiry.

In this case, Judge Buckley made no *Windham* inquiry, apparently basing his decision to deny the untimely request for self-representation on defendant's statement he would not be ready for trial in light of the prosecution's refusal to waive its speedy trial right. The court was also aware defendant's request was precipitated by his dissatisfaction with his current lawyer, whom he had unsuccessfully attempted to replace with the *Marsden* motion. Thus, the record shows the court considered the quality of defense counsel's representation, defendant's reason for the request, and defendant's implied request for a continuance after volunteering he would not be ready for trial within the remaining 12-day period. On the other hand, the record does not show defendant had previously sought to represent himself or to have his appointed counsel relieved, suggesting that granting his request would not have been unduly disruptive.²

E. Harmless Error

Whether the court erred in failing to make the *Windham* inquiry and the denial of the untimely request was thus improper, to be entitled to relief, defendant must demonstrate it is reasonably probable he would have received a more favorable result had the error not occurred, the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 for state law errors. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050 [although trial court erred in handling of untimely, nonconstitutional motion for self-representation,

² It is true, as the People argue, the decision to grant a request for self-representation should take into account whether the defendant is likely to engage in obstructionist behavior. (See *People v. Welch* (1999) 20 Cal.4th 701, 734.) And, it is also true, as the People assert, defendant disrupted proceedings on several occasions by interrupting the court, and distracting defense counsel. Indeed, just before the verdict was read, defendant attempted to read a prepared statement to the jury, forcing the court immediately to order the jury out of the courtroom. However, these instances occurred *after*, and *as a result of*, the denial of defendant's request to represent for self-representation. Nothing in defendant's conduct *prior* to his request gave the trial court a reasonable basis for believing his self-representation would create disruption during the proceedings. (*Ibid.*)

“this error is not automatically reversible, but is reviewed under the ‘harmless error’ test of *Watson*”]; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058 [same].)

Defendant was charged with one felony count and three misdemeanor counts. Represented by appointed counsel, defendant was found not guilty of the felony count and of one misdemeanor count. As for the remaining two counts, defendant repeatedly admitted during his testimony to having disobeyed a domestic relations court order as charged in count 4. As for the battery charge, defendant testified extensively at trial. His direct examination comprised approximately 30 pages of reporter’s transcript. Cross-examination and redirect examination added another 13 pages of reporter’s transcript. Given defendant’s guileless admission of having violated the court order, his unfettered explanations of his altercation with Castellanos, his past incidents of violence against her, and their volatile relationship in general, it is not reasonably probable defendant would have received a more favorable verdict had he been allowed to represent himself at trial. (See *People v. Rivers*, *supra*, 20 Cal.App.4th at p. 1053.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.